

Florence Competition Programme Advanced Competition Seminar The Facebook Case

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Abstract

On 15th December, 2018, the Florence Competition Programme (FCP) organized its second advanced competition seminar in the context of the FCP Annual Training, 2018/2019 edition. The seminar focused on the high-profile *Facebook* case, recently decided by the *Bundeskartellamt* (German Competition Authority) on 7th February, 2019.¹ The *Bundeskartellamt* decided that Facebook had abused its dominant position via the collection and use of personal data from third-party sources. The case represents one of the first attempts to enforce competition rules in the digital economy. In particular, it represents one of the first cases of exploitative abuses that are sanctioned in the context of the digital economy.

Besides the well-known German case, Facebook is also at loggerheads with the *Autorità Garante per la Concorrenza e il Mercato* (AGCM), which imposed a significant fine on Facebook on 7th December, 2018, for breach of the Italian consumer protection law.² Finally, on 18th May, 2017, the European Commission sanctioned Facebook for having provided misleading information in the context of the merger notification of its WhatsApp acquisition.³

During the advanced competition seminar, the discussion focused on the *Bundeskartellamt* investigations. Although the investigations were still open when the seminar was held

1. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html (10.4.2019).

2. <http://www.agcm.it/media/comunicati-stampa/2018/12/Uso-dei-dati-degli-utenti-a-fini-commerciali-sanzioni-per-10-milioni-di-euro-a-Facebook> (10.4.2019).

3. http://europa.eu/rapid/press-release_IP-17-1369_en.htm (10.4.2019).



in Florence, participants debated the preliminary assessment that was released by the *Bundeskartellamt* on 19th December, 2017.⁴ The latter document listed the alleged abuses of dominance by Facebook, by thus anticipating the grounds mentioned in the final decision adopted in February, 2019.

During the roundtable discussion, the speakers discussed a number of important questions in relation to the case, such as the definition of the relevant market that was followed by the *Bundeskartellamt* in the case. The first speaker noted that in its preliminary assessment, the *Bundeskartellamt* provided a rather narrow definition of a relevant market for social networks, excluding the substitutability of other social networks like LinkedIn, Xing or even WhatsApp. Only Google+ was considered a potential competitor, but it worth noting that Google decided recently to discontinue access to this network.

Another speakers delved into the definition of the relevant market in the case of two-sided platforms. The speaker argued that, in line with the decision of the US Supreme Court of Justice in *Amex*,⁵ whenever there is a transaction market, a single relevant market should be defined, including both parts of the platform. On the other hand, in a non-transactional platform, there should be two distinct, although correlated markets. The speaker argues that, as long as Facebook also sells data to third parties, it can be regarded as a three-sided market. The failure to inform the users that their data is being transferred outside Facebook is, strictly speaking, a consumer protection issue, but it also affects the pricing strategies of the platform. In conclusion, the speaker stated that, in the case of Facebook, there are three relevant markets: a market for users, a market for advertisers and a market for the sale of data.

A second question debated by the panelists concerned the legal basis that was relied upon by the *Bundeskartellamt*. In line with the preliminary assessment published in December, 2017, the *Bun-*

deskartellamt decided the case under Art. 19 of the German Act against the Restraints of Competition (GVB),⁶ rather than under Art. 102 TFEU. The *Bundeskartellamt*, in fact, considered that the conduct would not affect the intra-community trade so as to justify reliance on Art. 102 TFEU. During the debate, one of the speakers criticized the choice of the legal basis that was followed by the *Bundeskartellamt*, which excluded the application of the relevant case law of the EU Court of Justice on unfair contractual clauses under Art. 102 TFEU. Although such case-law is rather old, it could be applied to the Facebook case, considering “unfair” Facebook’s “unilateral” collection of personal data from a third party web-site without the users’ consent.

Another speaker also drew attention to the fact that Art. 19 GVB has different wording to Art. 102 TFEU. The provision refers to prohibiting the use of trading terms and conditions that the dominant undertaking could probably not demand if there were effective competition in the relevant product market. Art. 19 GVB therefore indicates a “stricter” approach to unilateral conducts than does Art. 102 TFEU. The speaker went on to describe a similar case, in which the German courts held that clauses, such as those applied by Facebook, amounted to an abuse of a dominant position. The speaker also explained that the rationale of the competition rules and consumer protection rules, respectively, are different: the imposition of unfair clauses may also be the result of an information asymmetry and might be carried out by a non-dominant company also. In conclusion, the speaker argued that competition law should be used with caution when other legal instruments with sufficient power (such as the EU consumer and data protection rules) are available.

Regarding the overlap between competition, data protection and consumer law, one of the speakers noted that although these policies share the common goal of safeguarding consumers, they have different objectives, scope and enforcement tools. They can therefore be applied in parallel. In this regard, one of the speakers suggested several ways in which public authorities who are entrusted with

4. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html (10.4.2019).

5. US Supreme Court, *Ohio et al. v. American Express*. Case No 16-1454. Decided on 25th June, 2018.

6. http://www.gesetze-im-internet.de/englisch_gwb/ (13.4.2019).



the enforcement of different regulations might cooperate. The Roundtable discussed, in particular, the efforts of the European Data Protection Supervisor for the creation of a Digital Clearing House.

The discussants expressed a wide range of views on the topical issue of the application of the competition rules in the digital economy, particularly where the legal provisions for the protection of data and of the consumers are also applicable.

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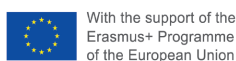
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The Florence Competition Programme

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